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Administrative Subpoenas in Criminal Investigations: A Sketch

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Summary

Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties. Both the President and Members of Congress have called for statutory adjustments relating to the use of administrative subpoenas in criminal investigations. One lower federal court has found the sweeping gag orders and lack of judicial review that mark one of the national security letter practices constitutionally defective. Proponents of expanded use emphasize the effectiveness of administrative subpoenas as an investigative tool and question the logic of its availability in drug and health care fraud cases but not in terrorism cases. Critics suggest that it is little more than a constitutionally suspect "trophy" power, easily abused and of little legitimate use.

Proposals in the 109th Congress for greater use of administrative subpoenas in a law enforcement context appear in S. 600, relating to the Secretary of State's responsibilities to protect U.S. foreign missions and foreign dignitaries visiting this country; in H.R. 3726, relating to federal obscenity investigations; and in H.R. 4170, relating to the apprehension of fugitives charged with, or convicted of, federal or state felonies. This is an abridged version — without footnotes, appendices, quotation marks and most citations to authority — of CRS Report RL33321, *Administrative Subpoenas in Criminal Investigations: Background and Proposed Adjustments*, by Charles Doyle.

Background. Administrative subpoenas are not a traditional tool of criminal law investigation, but neither are they unknown. Administrative subpoenas and criminal law overlap in at least four areas. First, under some administrative regimes it is a crime to fail to comply with an agency subpoena or with a court order secured to enforce it. Second, most administrative schemes are subject to criminal prohibitions for program-related misconduct of one kind or another, such as bribery or false statements, or for flagrant recalcitrance of those subject to regulatory direction. In this mix, agency subpoenas usually produce the grist for the administrative mill, but occasionally unearth evidence that forms the basis for a referral to the Department of Justice for criminal prosecution. Third, in an increasing number of situations, administrative subpoenas may be used for

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purposes of conducting a criminal investigation. Finally, particularly in the context of subpoenas used for criminal investigative purposes involving intelligence matters, disclosure of the existence of a subpoena may be a criminal offense.

Several statutes at least arguably authorize the use of administrative subpoenas primarily or exclusive for use in a criminal investigation in cases involving health care fraud, child abuse, Secret Service protection, controlled substance cases, and Inspector General investigations. In addition, five statutory provisions vest government officials responsible for certain foreign intelligence investigations with authority comparable to administrative subpoena access to various types of records.

Administrative Subpoenas Generally. Administrative agencies have long held the power to issue subpoenas and subpoenas duces tecum in aid of the agency's adjudicative and investigative functions. There are now over 300 instances where federal agencies have been granted administrative subpoena power in form or another. The statute granting the power ordinarily describes the circumstances under which it may be exercised: the scope of the authority, enforcement procedures, and sometimes limitations on dissemination of the information subpoenaed. In some instances, the statute may grant the power to issue subpoena duces tecum, but explicitly or implicitly deny the agency authority to compel testimony. The statute may authorize use of the subpoena power in conjunction with an agency's investigations or its administrative hearings or both. Authority is usually conferred upon a tribunal or upon the head of the agency. Although some statutes preclude or limit delegation, agency heads are usually free to delegate such authority and to authorize its redelegation thereafter within the agency. Failure to comply with an administrative subpoena may pave the way for denial of a license or permit or some similar adverse administrative decision in the matter to which the issuance of the subpoena was originally related. In most instances, however, administrative agencies ultimately rely upon the courts to enforce their subpoenas. Generally, the statute that grants the subpoena power will spell out the procedure for its enforcement.

Objections to the enforcement of administrative subpoenas must be derived from one of three sources: a constitutional provision; an understanding on the part of Congress; or the general standards governing judicial enforcement of administrative subpoenas. Constitutional challenges arise most often under the Fourth Amendment's condemnation of unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, or the claim that in a criminal context the administrative subpoena process is an intrusion into the power of the grand jury and its concomitant Fifth Amendment right to grand jury indictment.

In an early examination of the questions, the Supreme Court held that the Fourth Amendment did not preclude enforcement of an administrative subpoena issued by the Wage and Hour Administration notwithstanding the want of probable cause. Neither the Fourth Amendment nor the unclaimed Fifth Amendment privilege against self-incrimination were thought to pose any substantial obstacle to subpoena enforcement. Soon thereafter a second case echoed the same message — the Fourth Amendment does not demand a great deal of administrative subpoenas addressed to corporate entities; a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of agency, the demand is not too indefinite and the information sought is reasonably relevant. The gist of the protection

is in the requirement that the disclosure sought shall not be unreasonable. A statute or judicial tolerance, however, may require what the Constitution does not. Nevertheless when asked if the Internal Revenue Service (IRS) must have probable cause before issuing a summons for the production of documents, the Court intoned the standard often repeated in response to an administrative subpoena challenge, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons. He must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed This does not mean that under no circumstances may the court inquire into the underlying reason for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.

Criminal Administrative Subpoenas — Controlled Substances Act. The earliest of the three federal statutes (21 U.S.C. 876) used extensively for criminal investigative purposes appeared with little fanfare as part of the 1970 Controlled Substances Act, and empowers the Attorney General to issue subpoenas "in any investigation relating to his functions" under the act. In spite of its spacious language, the legislative history of section 876, emphasizes the value of the subpoena power for administrative purposes — its utility in assigning and reassigning substances to the act's various schedules and in regulating the activities of physicians, pharmacists, and the pharmaceutical industry — rather than as a criminal law enforcement tool. Nevertheless, the Attorney General has delegated the authority to issue subpoenas under section 876 to both administrative and criminal law enforcement personnel, and the courts have approved its use in inquiries conducted exclusively for purposes of criminal investigation. Section 876 authorizes both testimonial subpoenas and subpoenas duces tecum. It provides for judicial enforcement; failure to comply with the court's order to obey the subpoena is punishable as contempt of court; it contains no explicit prohibition on disclosure.

Inspectors General. The language of the Inspector General Act of 1978 provision is just as general as its controlled substance counterpart: each Inspector General, in carrying out the provisions of this act, is authorized to require by subpoena the production of all information necessary in the performance of the functions assigned by this act. Its legislative history supplies somewhat clearer evidence of an investigative tool intended for use in both administrative and criminal investigations. The Justice Department reports that the Inspector General's administrative subpoena authority is mainly used in criminal investigations, and the courts have held that the act gives the Inspectors General both civil and criminal investigative authority and subpoena powers coextensive with that authority. The act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under this authority.

Health Care, Child Abuse, and Presidential Protection. Unlike its companions, there can be little doubt that 18 U.S.C. 3486 is intended for use primarily in connection with criminal investigations. It is an amalgam of three relatively recent statutory provisions — one, the original, dealing with health care fraud; one with child abuse offenses; and one with threats against the President and others who fall under Secret Service protection. Section 3486 is both more explicit and more explicitly protective than either of its controlled substance or IG statutory counterparts. In addition to a judicial

enforcement provision, it specifically authorizes motions to quash and ex parte nondisclosure court orders. It affords those served a reasonable period of time to assemble subpoenaed material and respond and in the case of health care investigations the subpoena may call for delivery no more than 500 miles away. In child abuse and presidential investigation cases, however, it imposes no such geographical limitation and it may contemplate the use of “forthwith” subpoenas. It includes a “safe harbor” subsection that shields those who comply in good faith from civil liability; and in health care investigations limits further dissemination of the information secured.

Although the authority of section 3486 has been used fairly extensively, reported case law has been relatively sparse and limited to health care investigation subpoenas. The first of these simply held that the subject of a record subpoenaed from a third party custodian has no standing to move that the administrative subpoena be quashed. The others addressed constitutional challenges, and with one relatively narrow exception agreed that subpoenas in question complied with the demands of the Fourth Amendment. They cite *Oklahoma Press*, *Powell* and *Morton Salt* for the view that administrative subpoenas under section 3486 need not satisfy a probable cause standard. The Fourth Amendment only demands that the subpoena be reasonable, a standard that requires that 1) it satisfies the terms of its authorizing statute, 2) the documents requested were relevant to the Department of Justice’s investigation, 3) the information sought is not already in the Department of Justice’s possession, and 4) enforcing the subpoena will not constitute an abuse of the court’s process.

Of the three statutes that most clearly anticipate use of administrative subpoenas during a criminal investigation, section 3486 is the most detailed. Neither of the others has a nondisclosure feature nor a restriction on further dissemination; neither has an explicit safe harbor provision nor an express procedure for a motion to quash. All three, however, provide for judicial enforcement reenforced by the contempt power of the court.

Only the controlled substance authority of 21 U.S.C. 876 clearly extends beyond the power to subpoena records and other documents to encompass testimonial subpoena authority as well. The Inspector General Act speaks only of subpoenas for records, documents, and the like, and has been held to not include testimonial subpoenas. Section 3486 strikes a position somewhere in between; the custodian of subpoenaed records or documents may be compelled to testify concerning them, but there is no indication that the section otherwise conveys the power to issue testimonial subpoenas.

Proposals for Change. Although more extensive proposals were offered in the 108th Congress, the law enforcement related administrative subpoena proposals in the 109th Congress appear in S. 600, relating to the Secretary of State’s responsibility to protect U.S. foreign missions and foreign dignitaries visiting this country; in H.R. 3726, relating to federal obscenity investigations; and in H.R. 4170, relating to the apprehension of fugitives charged or convicted of federal or state felonies.